82-134

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

TAXATION WITH REPRESENTATION OF WASHINGTON,

Cross-Appellant,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,

Cross-Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTIONAL STATEMENT ON CROSS-APPEAL

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QUESTIONS PRESENTED

1. If, as the court of appeals held, section 501(c)(3) and related provisions of the Internal Revenue Code deny charities the equal protection of the laws with respect to the regulation of lobbying, what is the proper remedy to cure the constitutional defect?

2. Does the restriction on lobbying by charities which is contained in section 501(c)(3) of the Internal Revenue Code constitute an unconstitutional condition upon the exercise of their First Amendment rights?

In addition to the parties listed in the caption, Commissioner of Internal Revenue Roscoe L. Egger, Jr. and the United States of America are appellants in No. 81-2338 and cross-appellees with respect to this cross-appeal. Cross-appellant Taxation with Representation of Washington has no parent companies, subsidiaries, or affiliates withir the meaning of Rule 28.1.

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No.

TAXATION WITH REPRESENTATION OF WASHINGTON,

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DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,

Cross-Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTIONAL STATEMENT ON CROSS-APPEAL

OPINIONS BELOW

The opinion of the district court and its judgment in favor of appellants/cross-appellees Donald T. Regan, *et al.*, (hereinafter referred to as the "government") are reproduced in the appendix to the jurisdictional statement in No. 81-2338 (1a-10a). The decision is unofficially reported at 43 A.F.T.R.2d 79-679. The *en banc* opinion of the court of appeals (11a-121a) is reported at 676 F.2d 715.

JURISDICTION

This is a declaratory judgment action brought by appellee/cross-appellant Taxation with Representation of Washington ("Taxation") to challenge the denial to it of

tax-exempt status under section 501(c)(3) of the Internal Revenue Code (the "Code"). The action was brought pursuant to 26 U.S.C. § 7428, and jurisdiction was based on 28 U.S.C. § 1346(e). After an earlier opinion by a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit was vacated and the case was reheard *en banc*, the judgment and opinion of the court sitting *en banc* were entered on March 26, 1982. The court declared section 501(c) of the Code to be unconstitutional in its disparate treatment of lobbying by particular tax-exempt groups. The government filed a notice of appeal on April 23, 1982, and a jurisdictional statement was filed in this Court on June 22, 1982 (No. 81-2338). The jurisdiction of this Court in No. 81-2338 is based on 28 U.S.C. § 1252. The jurisdictional statement was received by Taxation on June 23, 1982. This Court has jurisdiction of the instant cross-appeal by virtue of 28 U.S.C. § 1252 and Rule 12.4 of the Rules of this Court.

STATUTES INVOLVED

The relevant provisions of the Internal Revenue Code are set forth at pages 123a-144a of the appendix in No. 81-2338.

STATEMENT OF THE CASE

The material facts in this controversy are undisputed and are set out in the government's jurisdictional statement in No. 81-2338 (at pages 3-10) and in the opinion of the court of appeals. Accordingly, Taxation will not restate all the facts here, although it will elaborate upon several issues bearing upon the questions presented in this cross-appeal.

Taxation brought this action to challenge the constitutionality of the restriction on lobbying which is contained

in section 501(c)(3) of the Internal Revenue Code. Under the statute, tax-exempt status is denied to an organization if a "substantial part" of its activities consists of "carrying on propaganda, or otherwise attempting, to influence legislation." Similarly, the deductibility of donations for federal income, estate, and gift tax purposes turns on the recipient organization's compliance with a "no substantial lobbying" condition which is the equivalent of that contained in section 501(c)(3). Code §§ 170(c)(2) (income tax); 2055(a)(2), 2106(a)(2) (estate tax); 2522(a)(2) (gift tax). In addition, foundations may be subject to a penalty if they make contributions to an organization which engages in substantial lobbying. Code § 4945. Under these statutes, Taxation's failure to comply with the "no substantial lobbying" restriction contained in section 501(c)(3) has resulted in its exclusion from the Internal Revenue Service's "Cumulative List" of organizations entitled to receive tax-deductible donations. As this Court has noted, "appearance on the Cumulative List is a prerequisite to successful fund raising for most charitable organizations. Many contributors simply will not make donations to an organization that does not appear on the Cumulative List." *Bob Jones University v. Simon*, 416 U.S. 725, 729-30 (1974); *see id.* at 730 n.3; *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 763-75 (1974) (Blackmun, J. dissenting).[1]

As described in the government's jurisdictional statement in No. 81-2338, Taxation raised two related but independent challenges to the constitutionality of section 501(c)(3). It prevailed on its equal protection claim, and

[1]For simplicity, we will refer only to section 501(c)(3) in discussing the restriction on lobbying, although the most important consequences of failure to qualify under section 501(c)(3) are caused more immediately by the operation of the other statutes which incorporate the section 501(c)(3) lobbying restriction.

that ruling is the subject of the government's appeal (No. 81-2338). The constitutional violation found by the court of appeals was based on the disparity of treatment between lobbying by charities in general and lobbying by charities that are in the category of veterans' groups:

> An organization such as Taxation may not receive tax-deductible contributions if it engages in "substantial" lobbying, but a qualifying veterans' organization may continue to receive tax-deductible contributions even if it lobbies as much and on as many issues as it chooses.
>
> * * *
>
> . . . [T]he Code's discriminatory treatment of lobbying by veterans' organizations does not even satisfy the test of rationality, much less the heightened level of scrutiny appropriate here. The legislative history of the tax exemptions accorded veterans demonstrates absolutely no governmental interest whatsoever that is served by allowing such groups to conduct substantial lobbying with tax-deductible contributions.

(23a, 66a).

Since the court of appeals upheld Taxation's equal protection claim, but not its alternative theory based on the First Amendment, there remained the task of determining the appropriate remedy (72a-78a). The majority expressed the view that "[i]t seems evident that the legislative judgment expressed in Section 501(c) will be less disturbed by striking down the preferential treatment now accorded the lobbying of veterans' organizations than by extending that treatment to Section 501(c)(3) organizations" (76a). However, the court did not decide the remedy issue, at least in part because the veterans' groups which would be affected by an extension of the lobbying restriction had

not been involved in the litigation (76a). Instead, the court ordered the case to be remanded to the district court "with the instruction that it cure the constitutionally invalid operation of Section 501(c) after inviting veterans' organizations to participate in framing the relief" (77a).

Taxation's alternative theory was that, even apart from the difference in treatment between charities and veterans' groups, the lobbying restriction in section 501(c)(3) violates the First Amendment by imposing an "unconstitutional condition" on the exercise of First Amendment rights. While acknowledging that Taxation's argument "has some strength" (32a), the majority rejected the First Amendment claim (34a). The dissenters also rejected the First Amendment claim, although for different reasons (87a-106a).

THE QUESTIONS PRESENTED BY THE CROSS-APPEAL ARE SUBSTANTIAL.

The questions presented by Taxation in this cross-appeal are intertwined with the issue raised by the government's appeal in No. 81-2338, and thus review should be granted in order to bring the entire case before this Court. Taxation is filing a response to the jurisdictional statement in No. 81-2338 expressing its view that the *en banc* decision of the court of appeals on the equal protection issue presents a substantial and important question which merits review by this Court. Whether or not the two additional questions presented in this cross-appeal would themselves call for the exercise of this Court's jurisdiction in the absence of the government's appeal, they should be considered in conjunction with No. 81-2338 if review is granted in that case.

The question of an appropriate remedy should be part of this Court's consideration of the equal protection claim. Such an issue traditionally has been decided without the

necessity for a remand as ordered by the court of appeals in this case. *See, e.g., Califano v. Westcott,* 443 U.S. 76, 89-91 (1979). Particularly here, where the statutory restriction which must be either extended or nullified affects the exercise of First Amendment rights, this Court should consider the remedy issue along with the merits of Taxation's claims, and it should invalidate the lobbying restriction if Taxation's claims are found to be meritorious. When an equal protection violation is established in the First Amendment context, the traditional remedy adopted by this Court is the nullification of the offending restriction on speech, not its extension to additional speakers. *See, e.g., Carey v. Brown,* 447 U.S. 455 (1980).

The second question posed by Taxation — its claim based on the First Amendment — is also closely related to the equal protection issue raised by the government's appeal. As the court of appeals recognized, this case is permeated with First Amendment issues even if it is analyzed as an equal protection case. *See* 12a ("a First Amendment concern must inform the equal protection analysis in this case"); 35a-36a n.23. Even though Taxation did not prevail on this claim in the court of appeals, both the majority and the dissenters treated the issue as a substantial one. *See* 29a-35a, 87a-106a. Moreover, if this Court agrees with Taxation on the First Amendment claim, the equal protection and remedy issues can be avoided.

A. The Remedy Issue

Because the essence of an equal protection claim is a disparity of treatment between classes of similarly situated persons, a constitutional violation can at least theoretically be remedied either by improving the treatment accorded the disfavored class, or by eliminating the advantage en-

joyed by the class which has benefited by the classification. Instead of ruling on the remedy issue itself, the court of appeals remanded it to the district court for its consideration (72a-78a). That ruling was in error because there is no need for a remand and because extension of the right to lobby to all charities is plainly the appropriate remedy.

"In choosing between [the] alternatives, a court should attempt to accommodate as fully as possible the policies and judgments expressed in the statutory scheme as a whole." *Califano v. Westcott, supra,* 443 U.S. at 94 (Powell, J., concurring in part and dissenting in part). *See generally* Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation,* 28 Cleveland St. L. Rev. 301 (1979). Many of the cases in which this issue has come up have involved equal protection challenges to underinclusive federal benefits statutes, and this Court "has suggested that extension, rather than nullification, is the proper course." *Califano v. Westcott, supra,* 443 U.S. at 89.[2] Furthermore, as *Califano v. Westcott* and the prior cases cited there indicate, it has been this Court's practice to resolve the question of remedy as a part of the disposition of the equal protection claim.

There are several additional reasons in this case for considering the remedy question along with the merits of the equal protection claim. When this Court has ordered benefit statutes to be extended in order to eliminate an equal protection violation, the result has often been a substantial expenditure of public funds. However, the government has never contended that elimination of the

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[2]Since this case involves a burden rather than a benefit, elimination of the burden would be the equivalent of "extension" of a benefit in a Social Security or similar case.

lobbying restriction challenged here would have any significant adverse impact on the Treasury. In fact, the government has never argued that the extension of the restriction to veterans' groups is the proper remedy. As a major reason for remanding the case, the court of appeals noted that the veterans' groups which would be affected by the selection of a remedy had not made their views known (76a), but four such groups have indicated that they will file briefs *amicus curiae* in this Court. Moreover, the choice of remedy in this case should take into account the inportant First Amendment interests involved here which are not typically present in Social Security or other benefit cases. Therefore, in the absence of an explicit legislative command, this Court should not permit invalidation of a statute to become an occasion for restricting free speech rights.

In past equal protection cases involving First Amendment rights, this Court has invalidated discriminatory restrictions on speech without even discussing the theoretical possibility of extending the restriction. *See, e.g., Carey v. Brown, supra; Police Department v. Mosley,* 408 U.S. 92 (1972). Likewise, in *Community-Service Broadcasting of Mid-America, Inc. v. FCC,* 593 F.2d 1102 (D.C. Cir. 1978), the United States Court of Appeals for the District of Columbia Circuit, sitting *en banc,* found that a requirement that non-commercial broadcasters retain tapes of certain programs violated equal protection principles, since no similar restriction was imposed on commercial broadcasters. The court struck down the requirement rather than extending it to cover the commercial broadcasters. A similar question was discussed in *Greenberg v. Bolger,* 497 F. Supp. 756 (E.D.N.Y. 1980), which invalidated a statute which withheld from smaller political parties an advantageous postal rate which was available to the two major parties.

The court concluded that the reduced rate should be available to all parties, because invalidation of the subsidies "would irretrievably frustrate political communication through the post by all parties." *Id.* at 786. Likewise, any resolution of this controversy which extended the restriction on lobbying to veterans' groups would inevitably dampen the exercise of rights which lie at the core of the activity which is protected by the First Amendment. If some new restriction on lobbying is to be developed to replace the statute declared unconstitutional by the court of appeals, that task should be undertaken by Congress, not the courts.

B. Taxation's First Amendment Claim

As the court of appeals held, "[t]here is no question whatsoever that lobbying comes within the protection of the First Amendment"(29a). *See, e.g., California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510-11 (1972); *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 137-38 (1961). The statute challenged in this action does not specifically prohibit Taxation from engaging in lobbying. Rather, section 501(c)(3) provides that, if Taxation engages in substantial lobbying, it will be ineligible for the government assistance which would otherwise be available to it. However, the absence of a direct prohibition does not dispose of Taxation's First Amendment claim. First Amendment freedoms are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle interference. *See, e.g., Healy v. James,* 408 U.S. 169, 183 (1972); *Williams v. Rhodes,* 393 U.S. 23, 41 (1968) (Harlan, J., concurring in the result); *Bates v. City of Little Rock,* 361 U.S. 516, 523 (1960).

In a long line of cases, this Court has invalidated indirect limitations on the exercise of First Amendment rights. *See* Troyer, *Charities, Law-Making, and the Constitution: The Validity of the Restrictions on Influencing Legislation,* 31 N.Y.U. Inst. on Fed. Tax 1415, 1425-27 (1973). *Speiser v. Randall,* 357 U.S. 513 (1958), is a classic example of an "unconstitutional condition." In that case, honorably discharged veterans were denied a veterans' property tax exemption because they declined to subscribe to the required oath that they did not advocate the overthrow of the government. This Court held that conditioning the tax benefit upon taking the oath was unconstitutional:

> To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty," its denial may not infringe speech.

357 U.S. at 518. *Speiser* has been followed by a number of cases reiterating and applying the "unconstitutional condition" doctrine. *McDaniel v. Paty,* 435 U.S. 618, 626 (1978); *Perry v. Sindermann,* 408 U.S. 593, 597 (1972); *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968); *Sherbert v. Verner,* 374 U.S. 398, 404-05 (1963); *Shelton v. Tucker,* 364 U.S. 479, 485-86 (1960).

The court of appeals' majority attempted to avoid the impact of the unconstitutional condition doctrine by stating that "First Amendment rights are not abridged merely because the government refuses to subsidize those rights" (30a), *citing Cammarano v. United States,* 358 U.S. 498 (1959). However, this case is distinguishable

from *Cammarano*, and both the majority and the dissenters in the court of appeals recognized that *Cammarano* is not controlling. *Cammarano* upheld only a denial of deductibility for the particular funds spent on lobbying, in contrast to section 501(c)(3), which causes a charity engaging in substantial lobbying to lose *all* tax-deductible contributions and all the other benefits of a section 501(c)(3) exemption. *See id.*, 358 U.S. at 515 (Douglas, J., concurring) (stating that the denial of all deductions to a taxpayer who engaged in lobbying would be an unconstitutional condition); *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980). *Cammarano* is also inapplicable in this case because the principle of "neutrality" toward lobbying, on which it was said to be based, was legislatively overruled in 1962 when Congress enacted section 162(e) of the Code. *See* 46a & n.29; 63a-64a.

The court of appeals also erred when it suggested that a charity like Taxation "can easily structure itself along dual lines, under both Sections 501(c)(3) and 501(c)(4) of the Code," in order to avoid the impact of the lobbying restriction (34a). Not only was the court factually inaccurate in its pronouncement about the effects of the statute[3], but it was also wrong as a matter of law in failing to recognize that the unconstitutionality of a condition does not depend upon its magnitude. *Elrod v. Burns*, 427 U.S. 347, 358 n.11 (1976) (plurality opinion) (conditions on public benefits are unconstitutional "however slight the

[3]An affidavit filed on behalf of Taxation in the district court described some of the disadvantages of attempting to use two organizations rather than a single unified one to carry out exempt purposes. Appendix Filed in the Court of Appeals, at 18. There is no evidence in the record to support the assertion that a dual structure can "easily" be utilized by charities which desire to conduct more lobbying than is permitted under section 501(c)(3).

inducement to the individual to foresake [First Amendment] rights"). *See also Healy v. James, supra,* 408 U.S. at 182-83 (First Amendment rights may be abridged by denial to a student group of recognition by a university, even though the students were free to meet off campus).

The practical effect of section 501(c)(3) is to single out one type of protected First Amendment activity for regulation, while permitting charities to use all other proper means, including speaking, publishing, and litigation, to promote their charitable purposes. However, there is no foundation for the premise that lobbying is a questionable activity which is inherently prone to abuse by charities. The choice of lobbying as a method of promoting charitable goals does not in any way indicate that diversion of funds to improper purposes is more likely to occur than if the charity chose another means of pursuing its goals, such as litigation. *See, e.g., In re Primus,* 436 U.S. 412 (1978).

Rather than being based on an undifferentiated hostility toward lobbying, the disposition of Taxation's First Amendment claim should turn on whether section 501(c)(3)'s restriction on lobbying by charities has been shown to be closely correlated to a governmental objective which is sufficiently important to justify the restriction. This Court recently reaffirmed that "regulation of First Amendment rights is always subject to exacting judicial scrutiny." *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley,* 102 S.Ct. 434, 436 (1981). *Accord, Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 68 (1981); *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 786 (1978); *Buckley v. Valeo,* 424 U.S. 1, 65 (1976).

To the extent that the sparse legislative history of the

lobbying restriction indicates that there was some Congressional concern about possible misuse of charitable funds to advance the private interests of donors (*but see* 49a n.31), the restriction does not meet the high standard of precision required of regulations in the First Amendment area. This Court has repeatedly struck down restrictions on speech which were not successful in achieving their asserted goals with sufficient precision. *See, e.g., Carey v. Brown, supra,* 447 U.S. at 464-69; *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 635-39 (1980); *First National Bank of Boston v. Bellotti, supra,* 435 U.S. at 786-95. As discussed above, section 501(c)(3)'s limitation on lobbying is far broader than can possibly be justified by the asserted legislative purpose, since substantial lobbying by a charity leads to the loss of all tax-deductible gifts. Moreover, this Draconian penalty is imposed entirely without regard to the existence of any improper activity, since a charity loses its section 501(c)(3) exemption even if it engages in substantial lobbying solely to advance the charitable goals for which it was created.[4]

As both opinions below recognize, the restriction on lobbying contained in section 501(c)(3) raises a substantial First Amendment issue. Moreover, the First Amendment issue is for all practical purposes inseparable from the equal protection challenge on which Taxation prevailed. Therefore, Taxation's First Amendment challenge to section 501(c)(3) should be considered by this Court if the

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[4]The term "charitable" in section 501(c)(3) is used in the generally accepted legal sense, 26 C.F.R. § 1.501(c)(3)-1(d)(2), and the law of trusts recognizes lobbying as a proper means by which to promote charitable purposes. 2 *Restatement (Second) of the Law of Trusts* § 374, at 257, 260 (1959); IV *Scott on Trusts* § 374.4, at 2912 (3d ed. 1967); Troyer, *supra,* 31 N.Y.U. Inst. on Federal Taxation at 1422-23. *See also* 33a n.20.

government's appeal of the equal protection holding is heard, so that all of the interrelated parts of this case will be before the Court for decision.

CONCLUSION

If this Court grants review of the government's appeal in this case, it should also note probable jurisdiction as to the two questions raised by Taxation's cross-appeal.

Respectfully submitted,

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ON CROSS-APPEAL FROM THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

MOTION TO DISMISS

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ON CROSS-APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION TO DISMISS

The Solicitor General, on behalf of the United States, Donald T. Regan, Secretary of the Treasury, and Roscoe L. Eggar, Jr., Commissioner of Internal Revenue, moves pursuant to Rule 16.1 of the Rules of this Court that this cross-appeal be dismissed for lack of jurisdiction.

OPINIONS BELOW

The opinion of the district court (81-2338 J.S. App. 1a-9a) and its order granting judgment in favor of the government (*id.* at 10a) are unofficially reported at 43 A.F.T.R.2d 79-679. The opinion of the court of appeals en banc (81-2338 J.S. App. 11a-12a) is reported at 676 F. 2d 715.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1982. The government filed its notice of appeal on April 23, 1982. The appeal was docketed as No. 81-2338 on June 22, 1982, and the jurisdictional statement was received by cross-appellant on June 23, 1982. This cross-appeal was filed on July 23, 1982. See Sup. Ct. R. 12.4. As explained below, there is no basis for jurisdiction of this cross-appeal.

STATUTE INVOLVED

28 U.S.C. 1252 provides:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.
>
> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

STATEMENT

In a memorandum in response to our jurisdictional statement in No. 81-2338, appellee joins with the appellants, United States and federal officials, in urging this Court to note probable jurisdiction to review the holding of the court of appeals that the lobbying limitations of Sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code (26 U.S.C.) violate appellee's Fifth Amendment right to equal protection.

Appellee, however, has docketed a cross-appeal (No. 82-134) seeking review of the court of appeals' separate holding that the lobbying limitations of Sections 501(c)(3) and 170(c)(2) do not violate its right to freedom of speech and to petition Congress under the First Amendment. Cross-appellant seeks a ruling from this Court striking the lobbying limitation from the statute and a declaratory judgment that it is therefore entitled to tax exemption under Section 501(c)(3).

ARGUMENT

1. There is no basis for jurisdiction in this Court of this cross-appeal. Cross-appellant invokes (J.S. 2) Rule 12.4 of the Rules of this Court, but that rule only establishes procedures for taking a cross-appeal. It could not, and explicitly does not purport to, provide a basis for jurisdiction. 28 U.S.C. 2071.

The only conceivable basis for appellate jurisdiction in this case is 28 U.S.C. 1252, which cross-appellant likewise invokes. Section 1252 allows a direct appeal to this Court from a decision holding an Act of Congress unconstitutional in any civil action to which the federal government is a party. The second paragraph of that section provides that when one party takes a direct appeal to the Supreme Court, as the United States did here, all other *appeals* in the case must be taken to the Supreme Court. This provision does not create any right of appeal; it merely avoids piecemeal litigation by specifying the court to which a party may take an appeal. See R. Stern & E. Gressman, *Supreme Court Practice* 79 (5th ed. 1978). Thus, a party must have a right to appeal before it can take that appeal to this Court. Because a party ordinarily has a right to appeal to the court of appeals from any adverse district court ruling embodied in a final decision (see 28 U.S.C. 1291), when a direct appeal is taken to this Court from a *district court* order holding a

federal statute unconstitutional, the appellee may file a cross-appeal to this Court on another issue in the case.

Here, however, the United States appealed from a judgment of a *court of appeals* holding a federal statute unconstitutional. See *Parker* v. *Levy*, 417 U.S. 733, 742-743 n.10 (1974). Cross-appellant had no right to appeal to this Court from an adverse ruling of the court of appeals; it could seek review only by writ of certiorari. The fact that the United States has taken an appeal under 28 U.S.C. 1252 from a judgment holding a federal statute unconstitutional does not create a right of appeal on other issues where none existed before.[1] Accordingly, there is no jurisdictional basis for the instant cross-appeal.

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[1]In enacting the second paragraph of 28 U.S.C. 1252, Congress obviously was concerned with the situation where one party appeals as of right to this Court from a district court order holding a federal statute unconstitutional, and the other party also wishes to challenge rulings of the district court on appeal. If the latter issues were to be appealed to the court of appeals pursuant to 28 U.S.C. 1291, then a single case would proceed simultaneously in two separate courts. If, on the other hand, the latter issues could not be appealed at all, then a party would have been deprived of its right to appeal. The solution was to allow the party not challenging the holding of unconstitutionality to pursue its appeal in the Supreme Court as well.

This dilemma does not arise when one party takes an appeal to this Court from the judgment of the court of appeals. The other party already has received an appellate ruling on the issues decided adversely to it, and in the usual situation it would have had no right to appeal that ruling to this Court. Appellate review would have been available only by writ of certiorari under 28 U.S.C. 1254(1). Congress could not have intended to transfer this class of cases from the Court's discretionary docket to its mandatory docket simply because the opposing party was authorized to take an appeal.

Further evidence that the second paragraph of 28 U.S.C. 1252 was not intended to benefit parties such as cross-appellant is supplied by the second sentence of that paragraph, which provides that "[a]ll appeals or cross appeals taken to other courts prior to such notice [of appeal to the Supreme Court] shall be treated as taken directly to the Supreme

Treating the cross-appeal as a petition for certiorari (see 28 U.S.C. 2103), the petition must be denied. The judgment of the court of appeals was entered on March 26, 1982. The jurisdictional statement was filed 119 days later, on July 23, 1982. Thus, it fails to comply with the time limitations of 28 U.S.C. 2101(c), which are jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942). Rule 19.5 of the Rules of this Court does provide that a respondent may file a cross-petition for certiorari within 30 days of receipt of the petition, but the Rules make no provision for the filing of a cross-petition in response to the docketing of an appeal.[2]

2. Even assuming that the Court has jurisdiction to grant certiorari here, the petition should be denied. The question presented by cross-appellant does not warrant review in this case.

As both courts below correctly recognized (81-2338 J.S. App. 5a-8a, 30a-31a), appellee's First Amendment claim is answered fully by this Court's decision in *Cammarano* v. *United States*, 358 U.S. 498, 512-513 (1959), which unanimously rejected the contention that denial of income tax deductions for lobbying expenditures presents a substantial constitutional issue under the First Amendment

---

Court." This language clearly shows that Congress focused only on direct appeals to the Supreme Court from a district court. (Indeed, it was not until 1974 that this Court construed Section 1252 to allow appeal from a court of appeals). Hence, it is most reasonable to interpret the word "appeal" in the second paragraph of Section 1252 to include only appeals as of right.

[2]We have advanced the same argument with respect to jurisdiction and timeliness as to certiorari in a Motion to Dismiss filed in *Beneficial Finance of Kansas, Inc.* v. *United States*, No. 81-583, a cross-appeal filed in connection with the government's appeal in *United States* v. *Security National Bank*, No. 81-184, oral argument scheduled on October 6, 1982. The Court has not acted on our motion to dismiss that cross-appeal.

(see 81-2338 J.S. 10-16). On the authority of *Cammarano*, the courts of appeals and the Court of Claims have ruled uniformly that the lobbying limitations of Sections 501(c)(3) and 170(c)(2) impair no right protected by the First Amendment. *Taxation With Representation* v. *United States*, 585 F. 2d 1219, 1223-1224 (4th Cir. 1978), cert. denied, 441 U.S. 905 (1979); *Christian Echoes National Ministry, Inc.* v. *United States*, 470 F. 2d 849, 856-857 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973); *Haswell* v. *United States*, 500 F. 2d 1133, 1147-1149 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975); see *"Americans United" Inc.* v. *Walters*, 477 F. 2d 1169, 1182 (D.C. Cir. 1973), rev'd on jurisdictional grounds *sub nom. Commissioner* v. *"Americans United" Inc.*, 416 U.S. 752 (1974). The holding below rejecting cross-appellant's First Amendment claim is fully in accord with that uniform authority.

Cross-appellant argues that *Cammarano* is distinguishable from this case because it upheld the denial of deductibility only for funds used specifically for lobbying whereas the lobbying limitations of Sections 501(c)(3) and 170(c)(2) disqualify appellee from holding charitable tax status and from receiving any tax-deductible contributions (82-134 J.S. 11). Contrary to cross-appellant's argument (*id.* at 13), these limitations are no broader than necessary to accomplish the underlying congressional purpose and are fully consistent with the First Amendment. Cf. 26 U.S.C. 501(h). As this Court pointed out in *Cammarano*, the lobbying limitations now embodied in Sections 501(c)(3) and 170(c)(2) "made explicit the conclusion * * * that 'political agitation as such is outside the statute, however innocent the aim * * *.' " 358 U.S. at 512, quoting *Slee* v. *Commissioner*, 42 F. 2d 184, 185 (2d Cir. 1930). The limitations on substantial lobbying correctly implement both that "sharply defined policy," *ibid.*, and the settled principle that the presence of a single nonexempt purpose, if substantial in nature, suffices

to disqualify an organization from holding charitable tax status. *Better Business Bureau* v. *United States*, 326 U.S. 279, 283, (1945); Treasury Regulations on Income Tax (1954 Code), Section 1.501(c)(3)-1(c) (26 C.F.R.). Cf. *United States* v. *Harriss*, 347 U.S. 612, 621-626 (1954).

CONCLUSION

The cross-appeal should be dismissed for lack of jurisdiction. Treating the jurisdictional statement as a petition for certiorari, the petition should be denied.

Respectfully submitted.

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SEPTEMBER 1982

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No. 82-134

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TAXATION WITH REPRESENTATION OF WASHINGTON,

Cross-Appellant,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,

Cross-Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF CROSS-APPELLANT

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF CROSS-APPELLANT

Appellants/cross-appellees Donald T. Regan, *et al.* filed a jurisdictional statement (No. 81-2338) asking this Court to review the *en banc* decision of the United States Court of Appeals for the District of Columbia Circuit that section 501(c)(3) and related provisions of the Internal Revenue Code deny charities the equal protection of the laws. Appellee/cross-appellant Taxation with Representation of Washington ("Taxation") then filed this cross-appeal (No. 82-134) to assure that this Court, should it grant review as requested by the Government, will also have before it two questions which are closely related to that presented in the Government's jurisdictional statement: (1) what relief is appropriate if the court of appeals'

holding on equal protection is affirmed, and (2) whether the court of appeals erred in rejecting Taxation's alternative claim based on the First Amendment.

The Government's appeal was taken pursuant to 28 U.S.C. § 1252. Taxation's cross-appeal under section 1252 was timely filed pursuant to Rule 12.4 of the Rules of this Court. Nonetheless, the Government argues that the cross-appeal should be dismissed, not because it fails to present important, unresolved issues, but because in its view no appeal is proper in these circumstances. Because the Government ignores both the plain language of the statute and the purpose underlying it, its motion to dismiss should be denied.

1. Section 1252 provides that "[a]ny party" may appeal directly to this Court from a judgment of "any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party." The Government's appeal (No. 81-2338) is authorized by section 1252, since the court of appeals held that section 501(c) of the Internal Revenue Code is unconstitutional. *See Parker v. Levy*, 417 U.S. 733, 742 n.10 (1974).

2. The motion to dismiss argues that even though the appeal in this case may be taken under section 1252, the cross-appeal may not. However, section 1252 itself specifically directs that once a section 1252 appeal is taken by any party, all other appeals must be taken to this Court;

> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts

> prior to such notice shall be treated as taken directly to the Supreme Court.

The Government recognizes that Congress intended by this paragraph to ensure that a single case was not divided between two courts, but maintains that it did not expand the right of appeal of a party not otherwise eligible to invoke section 1252 jurisdiction. Thus, according to the Government, Taxation's remedy is in the Supreme Court, but only by way of certiorari, not through a cross-appeal. In taking that position, it emphasizes that Taxation has already had one appeal (to the D.C. Circuit) and it asserts that the cross-appeal contemplated by section 1252 is limited to appeals from district courts, not from courts of appeals.

The principal difficulty with this position is that it has no support in the language of section 1252. That provision speaks in terms of "[a]ll appeals or cross appeals" and makes no mention of petitions for writs of certiorari. No decision of this Court, nor any other authority, suggests that the certiorari process has the remotest connection with cases in which the basis for jurisdiction in this Court is by an appeal. Under these circumstances it would be unreasonable to read section 1252, whose purpose is to keep an entire case in a single court, *United States v. Raines*, 362 U.S. 17, 27 n.7 (1960), to differentiate the methods by which the parts of that case reach this Court, absent any hint that Congress desired such a result. *See McLucas v. DeChamplain*, 421 U.S. 21, 31 (1975).

Besides ignoring the language and frustrating the purpose of section 1252, the theory underlying the Government's motion to dismiss would undermine one of the significant improvements brought about by the new Rules adopted by this Court in 1980. Under the prior Rules, there was no separate procedure for taking a cross-appeal

or filing a cross-petition for a writ of certiorari. Thus, the party which prevailed below was often forced to file its own jurisdictional statement or petition before it knew whether its opponent would seek review in this Court, or if so, what questions would be presented. *See generally* R. Stern & E. Gressman, *Supreme Court Practice* § 6.34, at 481-86 (5th ed. 1978). Under new Rule 12.4, there exists an efficient procedure of appeal and cross-appeal, which eliminates the filing of unnecessary jurisdictional statements with this Court. *See also* Rules 19.5, 20.5 (cross-petition for writ of certiorari). If the Government's interpretation of section 1252 were to be adopted, appeals under section 1252 would once again call for the filing of protective petitions for certiorari or jurisdictional statements by parties which prevailed below. Thus, these documents would have to be printed and filed, and the fees paid, but many of them would later be withdrawn as unnecessary. The improvements brought about by the 1980 Rules should not be disregarded in appeals under section 1252.

3. Apart from its technical assertion that a cross-appeal may not be taken to this Court under section 1252, the Government does not question that the issues raised by Taxation on cross-appeal are appropriate for review by this Court. Thus, it has not made a motion to affirm the portions of the judgment which are challenged by Taxation, and such a motion would not be appropriate here since it is proper only if "it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." S. Ct. Rule 16.1(c).

4. Ordinarily, if a party files a jurisdictional statement where the proper form of review is by petition for a writ of certiorari, this Court considers the case as if a petition for

a writ of certiorari had been filed. 28 U.S.C. § 2103. The Government takes the position that if Taxation has no right of cross-appeal in this case under 28 U.S.C. § 1252, and the jurisdictional statement is therefore considered as a petition for a writ of certiorari, it should be dismissed as untimely. Although the Rules governing appeals and those regulating petitions for writs of certiorari specify procedures for cross-appeals and cross-petitions which are virtually identical, there is no Rule specifically authorizing additional time to file a cross-petition for a writ of certiorari in response to a jurisdictional statement. The cross-appeal in this case, if considered as a petition for a writ of certiorari, should nonetheless be granted.

There is nothing in the Rules to suggest that the availability of the new procedure of cross-petition should not be available in those cases in which it is this Court's appellate jurisdiction which is invoked, rather than its discretionary jurisdiction. In this, as in any case which comes to this Court by way of a court of appeals, the Government could have sought a writ of certiorari rather than taking an appeal, and if it had done so, a cross-petition by Taxation plainly would have been proper. The highly technical interpretation of the Rules advanced by the Government, which would authorize a cross-petition *only* when the certiorari procedure is used by the opposing party to seek review, would frustrate rather than advance the intent of the new Rules adopted in 1980. *See* pages 3-4 *supra*. The Government also fails to recognize that under 28 U.S.C. § 2101(c) this Court has the authority to extend the time for applying for a writ of certiorari by 60 days. The Court therefore has jurisdiction over the cross-appeal in this case since it was filed well within 150 days after entry of the judgment below.

5. In arguing that the questions raised by Taxation are not worthy of this Court's consideration, the Government

does not even discuss the first question presented on the cross-appeal – the remedy which should be chosen to cure the constitutional defect found by the court of appeals. For the reasons more fully stated in Taxation's jurisdictional statement at pages 6-9, this Court should adhere to its consistent practice of deciding on an appropriate remedy as a part of its adjudication of an equal protection claim.

As to Taxation's First Amendment argument, the Government asserts that it "is answered fully by this Court's decision in *Cammarano* v. *United States,* 358 U.S. 498, 512-13 (1959)." Motion to Dismiss at 5. However, all ten of the judges on the court of appeals who considered this case agreed that *Cammarano* is not dispositive. Both the majority and the dissent found it necessary to go far beyond a citation to *Cammarano* in analyzing the First Amendment issue, particularly since the policy of "neutrality" toward lobbying which was said to underlie *Cammarano* was eliminated by Congress in 1962. *See* 46a & n.29; 63a-64a. Because section 501(c)(3) singles out a certain type of speech (lobbying) for unfavorable treatment, it raises serious First Amendment questions which were never addressed, let alone decided, in *Cammarano. See Consolidated Edison Co. v. Public Service Comm'n,* 447 U.S. 530, 537-38 (1980); *Carey v. Brown,* 447 U.S. 455, 462 n.6 (1980). *See also* 87a-106a (dissenters' discussion of the First Amendment claim).

The Government concedes that the lobbying limitations of sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code disqualify a charity like Taxation, which engages in substantial lobbying, from receiving *any* contributions which are tax-deductible to donors. Motion to Dismiss at 6. The Government also concedes that *Cammarano* involved only the question of deductibility of the particular funds spent on lobbying. *Id.* Yet its only response to Taxa-

tion's argument that there is a gross imbalance between the lobbying activity undertaken by a charity and the disastrous tax consquences suffered by it is the bald assertion that the "limitations are no broader than necessary to accomplish the underlying congressional purpose." Motion to Dismiss at 6.

The Government's citations to *Slee v. Commissioner*, 42 F.2d 184 (2d Cir. 1930), and *Better Business Bureau v. United States*, 326 U.S. 279 (1945), are also inapposite. Although an organization qualifying for a tax exemption under section 501(c)(3) must be organized and operated exclusively for exempt purposes, lobbying in furtherance of charitable purposes constitutes a charitable activity. *See* Taxation's Jurisdictional Statement at 13 n.4. The Government's suggestion that lobbying is *per se* improper or undesirable is contradicted both by section 162 (e) of the Code (which allows deductions for almost all business-related lobbying) and by section 501(h) of the Code (which specifically authorizes charities which elect to be covered by the statute to lobby up to certain specified ceilings). Like pamphleteering, litigation, and other forms of speech, lobbying in support of charitable purposes is an activity protected by the First Amendment, and one which can be restricted only upon a compelling showing of governmental need. No such compelling governmental interest has been identified, much less proven, and therefore a significant constitutional question has been raised concerning the tax code's restrictions on lobbying by charities.

CONCLUSION

The motion to dismiss should be denied. If review is granted in No. 81-2338, the questions raised by the cross-appeal should also be given plenary consideration by this Court.

Respectfully submitted,

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Cross-Appellees.

On Appeal From The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF AMICI CURIAE OF AMERICAN ASSOCIATION OF MUSEUMS, AMERICAN HEART ASSOCIATION, CAMP FIRE, INC., GIRL SCOUTS OF THE USA, LUTHERAN COUNCIL OF THE USA, NATIONAL AUDUBON SOCIETY, NATIONAL BOARD OF YMCAs, NATIONAL CONFERENCE OF CATHOLIC CHARITIES, NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE USA, NATIONAL COUNCIL OF LA RAZA, NATIONAL MENTAL HEALTH ASSOCIATION, AND NATIONAL WILDLIFE FEDERATION, IN SUPPORT OF THE CROSS-APPELLANT'S JURISDICTIONAL STATEMENT

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INTERESTS OF AMICI CURIAE

The American Association of Museums represents museums and museum professionals throughout the nation.

The American Heart Association, a national voluntary health organization with more than 2,000,000 members and volunteers, conducts a wide range of programs to reduce the incidence of death and disability from cardiovascular diseases.

Camp Fire, Inc. is a national, voluntary youth agency serving nearly 500,000 young people affiliated with more than 300 local councils.

Girl Scouts of the USA and its more than 330 local councils provide a variety of programs and services to nearly 3,000,000 girls nationwide.

The Lutheran Council of the USA is a cooperative organization serving the Lutheran Church in America, the American Lutheran Church, and the Association of Evangelical Lutheran Churches.

The National Audubon Society, a membership organization with more than 470,000 members nationwide, is dedicated to the protection of the environment and the conservation of wildlife and other natural resources.

The National Board of YMCAs represents more than 1,850 local Associations which endeavor to promote the spiritual, mental, and physical health of their more than 11 million members and program participants.

The National Conference of Catholic Charities is an association of more than 800 charitable agencies and institutions sponsored by Catholic dioceses throughout the United States.

The National Council of Churches of Christ in the USA is the cooperative agency of 31 national Protestant and Eastern Orthodox religious bodies with an aggregate membership of over 40 million persons.

The National Council of La Raza, with over 100 affiliated organizations in 23 states, is dedicated to promoting the social and economic well-being of Americans of Hispanic descent.

The National Mental Health Association is a nationwide organization of more than 1,000,000 lay and professional persons whose principal purpose is to prevent mental illness, promote mental health, and provide better services for the mentally disabled.

The National Wildlife Federation is a conservation education organization with more than 4.2 million members and contributors nationwide.

Each of the foregoing organizations is exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), and is a qualified recipient of tax-deductible charitable contributions under section 170(c)(2) of the Code, 26 U.S.C. § 170(c)(2).

Amici are filing this brief in support of the jurisdictional statement on cross-appeal filed by Taxation With Representation of Washington. That jurisdictional statement presents the following questions:

1. If, as the court of appeals held, section 501(c) and related provisions of the Internal Revenue Code deny the equal protection of the laws with respect to the regulation of lobbying, what is the proper remedy to cure the constitutional defect?
2. Does the restriction on lobbying by charities which is contained in section 501(c)(3) and related provisions of the Internal Revenue Code

constitute an unconstitutional condition upon the exercise of their First Amendment rights?

SUMMARY OF ARGUMENT

Lobbying is both a protected First Amendment activity and an important and entirely proper means of achieving charitable[1] purposes. Because section 501(c)(3) and related provisions of the Internal Revenue Code severely constrict charitable organizations' right to lobby, these statutory provisions place an unconstitutional condition on the exercise of charities' First Amendment rights. The court below addressed this First Amendment argument by pointing to alternative outlets for charities' lobbying efforts. This was error. The alternatives relied on by the court of appeals neither justify the statutory restrictions nor allow charities to pursue effectively their legitimate lobbying goals.

This First Amendment issue is inextricably linked to the equal protection issue which forms the basis of the government's appeal. Accordingly, as urged by Taxation With Representation of Washington, the Court should note probable jurisdiction as to the questions presented by the cross-appeal.

ARGUMENT

1. Legislative Activities Are An Important And Entirely Proper Means Of Achieving Charitable Purposes

The law of charitable trusts explicitly recognizes the importance and propriety of lobbying activities as a

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[1] The terms "charity" and "charitable" are used in this brief in their generic sense, and thus encompass religious, educational, scientific, cultural, and other philanthropic organizations exempt from tax under section 501(c)(3) of the Internal Revenue Code.

means of accomplishing charitable purposes. *2 Restatement (Second) of the Law of Trusts* § 374, at 257, 260 (1959); *IV Scott on Trusts* § 374.4, at 2912 (3rd ed. 1967); Bogert, *Trusts and Trustees* § 378, at 188-191 (2nd rev. ed. 1977). In practice, the ability of many charitable organizations to accomplish their charitable purposes is directly and importantly affected by their ability to participate in the legislative process. Each of the organizations joining in this brief considers lobbying vital to the accomplishment of its charitable goals.

2. The Statutory Restrictions On Lobbying By Charitable Organizations Violate The First Amendment

In a long line of cases the Court has held that the First Amendment not only forbids direct governmental restrictions on First Amendment rights but also bars the government from conditioning the receipt of a governmental benefit upon the abandonment of a First Amendment right. *Speiser* v. *Randall*, 357 U.S. 513 (1958), *Shelton* v. *Tucker*, 364 U.S. 479, 485-86 (1960); *Sherbert* v. *Verner*, 374 U.S. 398, 404-06 (1963); *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968); *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972); *McDaniel* v. *Paty*, 435 U.S. 618, 626 (1978).

The restriction on the lobbying activities of charitable organizations imposed by sections 170(c)(2) and 501(c)(3) and by the analogous estate and gift tax provisions[2] of the Internal Revenue Code is precisely the type of condition declared unconstitutional by this line of authority. Section 501(c)(3) and the related statutory provisions expressly condition a charity's right to receive deductible

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[2] Sec. 2055(a) (estate tax), and sec. 2522(a) (gift tax).

contributions—a governmental benefit recognized by the Court to be of paramount importance, *Bob Jones University* v. *Simon*, 416 U.S. 725, 729-30 (1974)—on the charity's willingness to accept severe restrictions on its First Amendment right to lobby. The Court has struck down such burdens on First Amendment rights, "however slight the inducement to the individual to forsake these rights." *Elrod* v. *Burns*, 427 U.S. 347, 358 n.11 (1976).

The Court below directly addressed this First Amendment argument and acknowledged its force, but responded as follows:

> It is overly mechanistic, however, to suggest that the section 501(c)(3) lobbying restriction actually is a condition on the receipt of tax benefits by charities. A group such as Taxation can easily structure itself along dual lines, under both Sections 501(c)(3) and 501(c)(4) of the Code, using the latter organization only for lobbying purposes.

676 F.2d 715, 726 (CADC 1982).

This response is erroneous. While it is true that section 501(c)(4) organizations may lobby, burdens on First Amendment rights have not traditionally been justified by contentions that alternative outlets for speech were available. *Schneider* v. *State of New Jersey*, 308 U.S. 147, 163 (1939); *Healy* v. *James*, 408 U.S. 169, 183 (1972); *Spence* v. *State of Washington*, 418 U.S. 405, 411 n.4 (1974). Moreover, it cannot reasonably be maintained that use of the dual organizational structure endorsed by the court of appeals represents an effective alternative to lobbying by the charity itself. However close the organizational link, the section 501(c)(4) affiliate often will not speak with the same authority as the charitable organization itself. Further, the potential for organizational conflict inherent in this dual structure seriously jeopardizes

the charity's ability to accomplish its goals. Finally, a charitable organization using a lobbying affiliate faces the continuing and often burdensome task of allocating the cost of shared employees, facilities, and expenses, a task complicated by the lack of clear legal rules for making these allocations.

The amici joining in this brief have substantial experience with the effect of the lobbying restrictions on section 501(c)(3) organizations, and could shed important light on this subject for the Court.

3. The Court Should Consider The Entire Case, Including The First Amendment Argument

If the Court hears this case, it should consider the entire case, including cross-appellant's First Amendment challenge to the lobbying restrictions imposed by section 501(c)(3) and related provisions of the Internal Revenue Code. As recognized by the court below, this First Amendment issue is inextricably linked to the equal protection issue which is the subject of the government's appeal. Consideration of both issues will enable the Court to hear and dispose of the entire case.

CONCLUSION

As urged by Taxation with Representation of Washington, the Court should note probable jurisdiction as to the questions raised by the cross-appeal.

Respectfully submitted,

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PROCEEDINGS AND ORDERS DATE: 052683

CASE NBR 82-1-00134 AFX

SHORT TITLE Taxation with Rep. of WA DOCKETED: Jul 23 1982

VERSUS Regan, Sec. of Treas.

Date	Proceedings and Orders
Jul 23 1982	Statement as to jurisdiction filed.
Aug 20 1982	Brief amicus curiae of American Assoc. of Museums, et al. filed.
Sep 7 1982	DISTRIBUTED. September 27, 1982
Sep 9 1982	Motion of appellees Sec. of the Treasury to dismiss filed.
Sep 21 1982	Reply brief of appellant Taxation with Rep. of WA filed.
Jan 26 1983	Record filed.
Jan 26 1983	Certified original record, (BOX) received.
May 23 1983	Judgment REVERSED. The motion to dismiss is denied.
	Judgment REVERSED. (See opinion of Court in No 81-2338).

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